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In The

Supreme Court of the United States

October Term, 1976

No. 76-444

Northeast Marine Terminal Company, Inc. and
State Insurance Fund,
Petitioners,

v.

Ralph Caputo

and

Director, Office of Workers' Compensation Programs,
United States Department of Labor
Respondents.

No. 76-454

International Terminal Operating Co., Inc.
Petitioner,

v.

Carmelo Blundo

and

Director, Office of Workers' Compensation Programs,
United States Department of Labor
Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

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INDEX

	PAGE
Statement of Interest of *Amicus Curiae*	2
Counter-Statement of the Question Presented	5
ARGUMENT	5
1. Introduction	5
2. Status of the Industry in 1972 and to date	7
3. The rationale and legal basis supporting the nexus of employment and insurable interests as the statutory criteria	9
4. Congress should not be presumed to have intended an injustice	17
5. "Point of rest" is anomalous. The Board's decisions are well-founded in law and on the facts	19
Two fundamental irregularities	21
Conclusion	23

CITATIONS

Cases:

Gutierrez v. *Waterman Steamship Corp.*, 373 U.S. 206 (1962)	11
Huff v. *Matson Navigation Co.*, 338 F. 2nd 205 (9th Cir. 1964)	9
ILA and NYSA v. *National Labor Relations Board*, —— F. 2d —— (No. 75-4266, 2nd Cir., June 29, 1976), cert. den., —— U.S. —— (Nos. 76-759, 76-760, Jan. 10, 1976)	5

PAGE

Intercontinental Container Transport Corporation v. *NYSA, Inc. and ILA*, 426 F. 2d 884 (2nd Cir. 1970) 10, 16, 18, 19

I.T.O. Corporation of Baltimore v. *Benefits Review Board*, 529 F. 2d 1080 (4th Cir. 1975), *reh. in banc*, 542 F. 2d 903 (1976), *cert. pend. sub nom. Maritime Terminals, Inc.* v. *Brown* (No. 76-706, Nov. 19, 1976) and *Adkins* v. *I.T.O. Corp. of Baltimore* (No. 76-730, Nov. 24, 1976) 3, 20

Jacksonville Shipyards, Inc. v. *Perdue*, 539 F. 2d 533 (5th Cir. 1976), *cert. pend. sub nom. Pfeiffer* v. *Ford* (No. 76-641, Nov. 10, 1976) 3, 17, 18

Leather's Best v. *S.S. Mormaclynx*, 451 F. 2d 800 (2nd Cir. 1971) 8

Matter of New York Shipping Association, 116 NLRB 1183 (1956) 2, 15

Nacerima Operating Co. v. *Johnson*, 396 U.S. 212 (1969) 15, 16, 19, 20

Sea-Land Service, Inc. v. *Director, Office of Workers' Compensation Programs (Wallace C. Johns)*, 540 F. 2d 629 (3d Cir. 1976) 3, 9, 11, 13

Victory Carriers, Inc. v. *Law*, 404 U.S. 202 (1971) ... 11

Statutes:

Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. ..... *passim*

33 U.S.C. § 902(3) 5

33 U.S.C. § 903(a) 5

33 U.S.C. § 920 ..... 4, 5, 20

PAGE

29 U.S.C. § 152(5) (§ 2(5), National Labor Relations Act, as amended) 2

Act of Aug. 12, 1953, C. 407, 67 Stat. 541 (Waterfront Employment and Air Freight Industry Regulation ("Waterfront Compact")), McKinney's Unconsolidated Laws of New York § 9801 *et seq.*; § 32:23-6, N.J.S.A. 11, 12, 14, 15

Miscellaneous:

1972 U.S. Code, Congressional & Administrative News, Vol. 3, pp. 4707-4708 (92nd Congress, 2nd Session) 8

Survey: "Stevedore and Marine Terminal Practices at the Ports of the United States" 22

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BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Statement of Interest of *Amicus Curiae*

This Brief *Amicus Curiae* is filed on behalf of the International Longshoremen's Association, AFL-CIO (hereinafter "ILA") with the written consent of all parties in these cases. The ILA is a "labor organization" within the meaning of Section 2(5) of the National Labor Relations Act, as amended, 29 USC § 152(5). Its office and principal place of business is in New York, New York, the situs of the events and proceedings herein.

In addition to its status as the parent union of the local collective bargaining representatives of respondents Ralph Caputo and Carmelo Blundo, the ILA is the certified representative of all employees in longshore and related crafts who work at piers and terminals throughout the Port of New York, encompassing the states of New York and New Jersey.[1] ILA, directly or through its affiliated, subsidiary District Councils and Locals, represents in excess of 115,000 such employees engaged in the movement,

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[1] The certified unit is defined in *Matter of New York Shipping Association,* 116 NLRB 1183 at 1188 (1956) as:

> "All longshore employees engaged in work pertaining to the rigging of ships, coaling of same, loading and unloading of cargoes, including mail, ships' stores and baggage, handling lines in connection with the docking and undocking of ships, including hatch bosses, cargo repairmen, checkers, clerks and timekeepers and their assistants, including head receiving and delivery clerks; general maintenance, mechanical and miscellaneous workers; horse and cattle fitters, grain ceilers and marine carpenters, in the Port of Greater New York and vicinity. . . ."

Employees in the foregoing classifications are customarily designated "deepsea" longshoremen, an allusion to their location at dockside and engagement in work directly related to the loading and discharge of cargo aboard ocean-going vessels. The work of the employees in the various listed categories is interrelated to the point where employment of one group necessarily will result in correlative jobs for others within the certified unit, as will appear hereinafter.

handling and processing of cargo in maritime commerce on the East and Gulf Coasts of the United States from Maine to Texas, as well as on the Great Lakes.

It is reasonably self-evident from the title of the Act under consideration that ILA's membership, generally, and specifically as pertains to Blundo, Caputo and their fellow employees in the unit in the Port of New York, is directly affected by the provisions of this Act. Furthermore, the ILA is a joint Administrator of various welfare trust funds for employees in longshore and related crafts. Payments from these funds are—and will continue to be—disbursed in relation to the amount of compensation available to, and received by their beneficiaries, exemplified by Blundo and Caputo. For these reasons, ILA was permitted to participate in the proceedings before the Second Circuit, in which it filed a consolidated Brief *Amicus Curiae.*

As *amicus,* ILA relies on the essentially undisputed statements of facts set forth in the parties' briefs, particularly as detailed and recited by counsel for respondents Blundo and Caputo. ILA similarly concurs and joins in the arguments set forth in the latter's responsive brief, which, for the most part, were variously and thoroughly developed in Judge Craven's consummate Dissenting Opinion in *I.T.O. Corporation of Baltimore* v. *Benefits Review Board,* 529 F.2d 1080, 1089-1101 (4th Cir., 1975), *reh. in banc,* 542 F. 2d 903 (1976), cert. pend. sub nom. *Maritime Terminals, Inc.* v. *Brown* (No. 76-706, Nov. 19, 1976) and *Adkins* v. *I.T.O. Corp. of Baltimore* (No. 76-730, Nov. 24, 1976); in *Jacksonville Shipyards, Inc.* v. *Perdue,* 539 F. 2d 533 (5th Cir. 1976), cert. pend. sub nom. *Pfeiffer* v. *Ford* (No. 76-641, Nov. 10, 1976) (hereinafter "Ford"); in *Sea Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs (Wallace C. Johns),* 540 F. 2d 629 (3rd Cir. 1976) (hereinafter "Johns"), and, of course, in the majority opinion below.

Amicus' purpose in filing this brief is to address the issue of the extent of coverage under the 1972 amendments to the Act in the broad overview of these cases, so as to give the Court the benefit of the perspective of the employees employed as longshoremen and in longshore operations whom it represents. After all, they are actually or potentially the injured parties who stand most to gain or to lose from the Court's determinations in these and in related cases.[2]

We intend to buttress this perspective by appropriate references to the forecited and other relevant appellate decisions, consistent with the Act's continuing presumption in favor of claims. 33 USC § 920. These cases as well as other pertinent background materials cumulatively demonstrate that employees of vessel carriers and their shoreside stevedore and terminal agents, including those as Blundo and Caputo, who carry out the *initial* and *final* steps in the carriers' movement of that freight, were the concern of Congress and were intended to be covered under the 1972 amendments.[3]

Finally, *amicus* will endeavor to point out, dispel and correct fundamental misconceptions, inconsistencies and contradictions appearing in the briefs for petitioners and the NAS. These tend to conflict with the history and realities of waterfront employment respecting the movement of maritime commerce, and to lay bare the error of their arguments-in-chief.

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[2] Indeed, *amicus* National Association of Stevedores (hereinafter "NAS") acknowledges that the interest of the "injured worker" surpasses even its own interest and the interest of its member-companies, the private marine terminal and stevedore employers of longshoremen on all four coasts of the United States (NAS Brief at page 3).

[3] In view of the statutory presumption, it might be more aptly stated that petitioners have *failed* to meet their burden of proving that the coverage discerned by the Benefits Review Board (hereinafter "the Board") was *not* intended by Congress.

Counter-Statement of the Question Presented

Whether claimants, members of the multi-employer longshore bargaining unit in the Port of New York, who are employed exclusively at shipside piers and terminals by contracting employers, for the express purpose of furnishing services directly and indirectly incident to the movement of oceanborne cargo, could reasonably be found by the Benefits Review Board to be covered by the explicit definitions of "employee" and "employer" under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3), in view of the undisturbed statutory presumption in favor of federal (rather than state) compensation for work-related injuries sustained by them in the course of their employment (33 U.S.C. §§ 903(a) and 920)?

Argument

1. Introduction.

Amicus feels confident that the employers, who artfully seek to persuade this Court to restrict the coverage of the Act in order to reduce their workmen's compensation premiums, *would never,* in face-to-face negotiations with their employees' representatives, assert the ludicrous positions being pressed before this Court. They know full well that their longshore employees have handled *all* work in connection with the loading and discharging of ocean cargo on ships.

This assertion was recently confirmed by a statement of several of the various employers who are parties to the instant and related litigation, whether as petitioners or as members of the NAS. We quote from the brief of the New York Shipping Association ("NYSA") in *ILA and NYSA* v. *National Labor Relations Board,* —— F. 2d —— (No. 75-4266, 2nd Cir., June 29, 1976, cert. den., —— U.S. —— (Nos. 76-759, 76-760, Jan. 10, 1977):

> "[T]he traditional work of ILA longshoremen on the piers and docks is not limited to loading and unloading

ships. It never has been. The ILA's work jurisdiction extends beyond the vessel. Thousands of longshoremen are employed on pier terminals in addition to ship gangs. In fact, some 25,000 longshoremen, were employed before the [National Labor Relations] Board's decision, in stuffing and stripping local LTL and consolidated cargo. Historically, the ILA's exclusive, all-encompassing jurisdiction has enveloped all stevedoring activities at the extensive waterfront terminals in the Port of Greater New York.

"The ILA longshoremen's handling of cargo for ocean shipment involves not only the stowage and discharge of cargo to and from the vessel. It also deals with all the interrelated terminal functions in the movement of cargo across the piers from the tailgate of the delivery truck to the hold of the vessel for out-bound cargo and the converse for in-bound cargo. Such ILA work includes receipt, storage, sorting, checking, palletizing, cargo repairs, carpentry, maintenance and delivery." (Brief of Petitioner NYSA at page 10).

Thus, the longshore work described above includes exactly what the claimants herein were doing when they were injured. It ill behooves the petitioners and the NAS to come before the Court and now pretend that the work of Blundo and Caputo, as of their fellow longshoremen in the terminal shed, is not maritime employment. There should be no doubt that they are covered by the Act, whether engaged in stuffing, stripping, checking, delivering or any other assignment *given them by their maritime employers.* Certainly, at the time of their injuries, Blundo and Caputo *were not* employees of the trucking companies, or of any of the consignees' other agents. Any suggestions that their work, at the instance of the maritime employers, was in the employ of the trucking or consignee's agents, is at complete variance with the established history of the longshore unit and longshore operations in the Port of New York. They deserve summary rejection.

Amicus respectfully submits that petitioners and NAS postulate untenable premises and reach unacceptable conclusions. This is the outgrowth of their failure to grasp the larger, overall context of the records in these proceedings. These include: (a) the advanced and changed state of the industry at the time of the 1972 hearings and legislation, of which the Congress was fully and knowledgably aware; (b) the history of, and developments in, the longshore industry in the Port of New York, as reflected in the laws of New York and New Jersey governing their common Port, and in the annals of the National Labor Relations Board; and (3) the day-to-day occupations and mechanics of longshore practices and employment, in this port in particular, which in many—but definitely not in all—respects are comparable to those of other ports along the East and Gulf coasts of the United States.

2. Status of the industry in 1972 and to date.

The traditional work of the ILA longshoremen and allied craft workers underwent a drastic transformation in the mid-1960's when automation approached the piers and terminals in East Coast ports. Gone are the slings, bailing hooks, and hand trucks. In their place are huge 20′ by 40′ metal containers and terminal sheds where these containers are "stuffed" (loaded) with, and "stripped" (unloaded) of, non-unitized cargo.

It is incontestable that containerization has moved the locus of longshore work land-ward. Longshoring operations in a modern container port facility take place geographically several hundred yards from the water's edge. The modern container terminals which now exist in the major ports, including the Port of New York, cover large sprawling areas, necessarily so to provide immense container marshalling-storage areas, stuffing and stripping sheds and gigantic, pier-side cranes that hoist the containers aboard—and remove them from—the ships. Congress was well aware of this fundamental and drastic shift

in the locus of longshore activities. Thus, the pertinent Congressional reports state:

> "It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-Type vessels, more of the longshoreman's work is performed on land than heretofore." (1972 U.S. Code Cong. Adm. News, vol. 3, pages 4707-4708, 92nd Congress, 2d Session, entitled: "Extension of coverage to shore-side areas.")

The foregoing specific reference to containerization and its effects clearly evinces Congress' understanding that the historic patterns in the movement of maritime cargo have been restructured to accommodate the advent of containerization. Also, that "maritime employment" and "longshore operations" must be (re-)defined and understood in the context of the movement of ocean-going cargo in—and by—containers. *Ergo,* it cannot be gainsaid that the claimants are precisely those persons to whom Congress sought to extend coverage and protection under the Act.

The cargo is no longer put directly in the ship's hold. There is no work in the hold. Each container is a module. Cumulatively, the containers function as a ship's hold. *Leather's Best* v. *S.S. Mormaclynx,* 451 F. 2d 800, 815 (2nd Cir. 1971). The cargo-handling aspects of longshore work are performed in relation to these mobile parts of the ship, rather than to the ship at anchor. Modernization of operations, whether through new equipment or novel divisions of labor, does not in any way change its maritime character. See, e.g., *Huff* v. *Matson Navigation Co.,* 338 F. 2d 205, 212-213 (9th Cir., 1964). It follows that so long as "the jurisdiction nexus", i.e., "the function being performed by the injured employee [related to] waterborne transportation" is maintained, the injury is compensable under the Act. (*Johns, supra,* 540 F. 2d at 638).

3. The rationale and legal basis supporting the nexus of employment and insurable interests as the statutory criteria.

Petitioners' and NAS's references to contract law, tort law and other common-law and statutory schemes not directly bearing on the employment relationship between unit employees and their stevedore and terminal employers, cannot overcome the statutory presumptions. For it is *that* relationship—and none other—that permeates, and is articulated by, the statutory definitions. It alone gives rise, *ab initio,* to grounds for compensation— *workmen's* compensation. These grounds are unrelated to pre-amendment third-party liabilities, to the status of the cargo time-wise, or to any other consideration that does not require an employee of the insured employer to perform an act which places him in an injury-prone situation.

ILA therefore submits that the only relevant question in determining compensability is: whether or not the injury was an outgrowth of the employment relationship. If the answer is affirmative, then the following can reasonably be deduced:

(a) the employment of Blundo, Caputo and like unit employees were for employers engaged as vessel carriers, or in providing services to or for such carriers, as stevedores or ocean terminal operators; (b) such employers are part of the overall collective bargaining structure governing employment in the maritime industry; (c) the terms and conditions pursuant to which they are employed are set forth in Agreements which, specifically and generically, contemplate only their employment in handling ocean cargo and maritime-related functions on docks, piers and terminals, the *exclusive* situs of longshore unit work; (d) those Agreements, just as the pertinent portions of the maritime employer's business herein covered by those Agreements, do not call for work on behalf of the consignees, or of their trucking agents; (e) the employers

are being insured, as required by law, while—and because—these employees are performing their assigned work, under the collective bargaining agreement. *Ergo,* compensability and the terms of compensation for work-related injuries—so long as occurring on the statutorily-prescribed situs of longshore unit employment—are within the four corners of the amended Act.

A Fortiori, the Act totally encompasses longshoremen, except in the instance that a unit employee could ever be found to be an employee of the consignee or its delivery agent, in the final phase (or step) of handling the cargo on the terminal premises. This reasoning is so far-fetched as to border fantasy. The consignees and their agents are not—and cannot be—parties to the longshore Agreements, which set and define the employees' wages and fringe benefits (See *Intercontinental Container Transport Corporation* v. *NYSA, Inc. and ILA,* 426 F.2d 884 at 889 (2nd Cir. 1970) (hereinafter "ICTC"). Moreover, the terminal shed workers remain on the payrolls of their regular employers in the course of delivering the maritime cargo to the consignees' trucking agents. (Note: the age of the "public loader" is ancient history).

The Third Circuit, in *Johns, supra,* thus properly looked to the "presence of a nexus between the employer-employee relationship and maritime commerce." It stated that "it is the existence of this special employer-employee relationship, and not the situs of that relationship, that is significant for purposes of admiralty jurisdiction," 540 F.2d at 636, citing *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202 at 204, 214 (1971) and *Gutierrez* v. *Waterman Steamship Corp.,* 373 U.S. 206 (1962). That Court, viewing the problem "from a fresh perspective" which it described as "functional and not spatial," *ibid.,* proceeded to conclude that:

> "[t]he line which Congress intended to draw was between the maritime commerce and land commerce, and the coverage of the federal law starts at the point where the cargo passes to or from an employer engaged in the former to an employer engaged in the latter." (540 F. 2d at 639.)

This "line" of demarcation is the only natural and arguable one within the purpose and scope of the Act. It tracks the gamut of the injured employee's (and of his employer's) activities *vis-a-vis* the cargo.

Amicus respectfully submits that there can rarely be a more definitive description of a person's occupation or employment status than that conferred by law and by regulatory bodies. We request the Court to take judicial notice that longshoremen, including checkers, are licensed by the Waterfront Commission of New York and New Jersey. The Commission was established to implement the "Waterfront Compact" of the Port of New York.[4] That Compact contains definitions of industry terminology and operations[5] of singular significance to the issues of these cases,

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[4] *Waterfront Employment and Air Freight Industry Regulation,* McKinney's Unconsolidated Laws of New York, § 9801 et seq. The corresponding New Jersey law is at § 32:23-6, N.J.S.A.

[5] The following Bi-State Compacts definitions are found in the New York version at § 9806 of McKinney's, *supra:*

"Longshoreman" shall mean a natural person, other than a hiring agent, *who is employed for work at a pier or other waterfront terminal,* either by a carrier of freight by water *or by a stevedore*

(a) physically *to move waterborne freight* on vessels berthed at piers, on piers or at other waterfront terminals, or

(b) to engage in direct and immediate checking of any such freight or of the custodial accounting therefor or in the recording

(*footnote continued on following page*)

on several grounds. They were devised and agreed upon by knowledgable persons on both sides of the harbor and of the employment relationship, who have abided by them for almost a quarter century. They thus reflect the customs and practices in the industry which can serve as guides to finding and defining the scope of maritime related activities and employment. Of most importance herein, they comprise the only available insight into the Congressional contemplation and intendment with respect to "longshore operations" in the long hiatus between the 1927 and 1972 versions of the Act's coverage. The Compact required the consent—*ergo,* approval—of the Congress. Act of August 12, 1953, C. 407, 67 Stat. 541.

The petitioner in *Caputo,* as well as the NAS, concede that the legislative history of the 1972 amendments pertaining to the extension of the Act's coverage shoreward is "meager" (*Caputo* brief at pp. 7-8 and fn. 5 thereto; NAS brief at p. 9).[6] They therefore interpolate whatever inconclusive history that is available on the 1972

(*footnote continued from preceding page*)

or tabulation of the hours worked at piers or other waterfront terminals *by natural persons employed by carriers of freight by water or stevedores,* . . .

"Pier" shall include any wharf, pier, dock or quay.

That the Petitioners' and NAS's attempts to differentiate "Stevedores" from "Terminal Operators" is to draw a difference without a distinction under the Act's definition of an "employer". This is also shown by the following Compact definition consistent with the Commission's licensing of employers who operate in the Port:

"Stevedore" shall mean a contractor (not including an employee) engaged for compensation pursuant to a contract or arrangement *with a carrier of freight by water,* in moving waterborne freight carried or consigned for carriage by such carrier on vessels of such carrier berthed at piers, on piers at which such vessels are berthed or at other waterfront terminals. (Emphasis added)

[6] References to the briefs of the petitioners in *Blundo* and *Caputo* and of NAS are referred to by name and page (e.g., *Blundo* Brief at p.).

changes to support their positions, though it is obvious that the several Courts that have struggled with these problems have been able to reach opposite conclusions derived from the very same Congressional reports.

ILA submits that the definitions in the Compact tend to illuminate the "silent" area in the legislative history of the instant Act which has given rise to the present plethora of litigation.[7] *Amicus* further submits that it

[7] "The problem with which we are here concerned arises from Congress' failure to supply any definition of two terms in § 902 (3)—engaged in maritime employment and 'any longshoreman or other person engaged in longshoring operations'." (Appendix, *Caputo* Petition at 9a, quoting from the decisions below.) However, the Court in *Johns, supra,* seems to best describe this "no-man's land" of contention as follows:

> "In our view, if Congress had wished to adopt the 'point of rest' as the test for coverage, it would have made that intention clear. As it is, the 'point of rest' analysis is to be found neither in the statute itself nor in the legislative history. The closest approach to such a test appears in the following passage from the House Report:
>
> 'To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area . . . [E]mployees whose responsibility is only to pick up stored cargo for further transhipment would not be covered. . . . H.R. No. 92-1441, 1972 U.S. Code Congressional & Administrative News, at 4708.'
>
> "In our opinion, these remarks establish no more than that workers who bring cargo to a storage area from on board ship are covered, while those persons (generally truckers or railroad pesonnel) who merely receive cargo and transport it inland are not covered. *The House Committee in this passage did not even mention those employees who handle cargo between the first holding area and the cargo's departure via land transportation. It is precisely the treatment of this intermediate group of workers with which we are here concerned, and this passage is totally silent as to them.* Elsewhere, as we

(*footnote continued on following page*)

should be evident from the terms governing the application of the Compact, that the activities of a "longshoreman", *per se,* are not confined to carrier-related operations at a wharf, pier, dock or quay. ILA believes, consonant with its long and intimate experience, that it is obvious that the Waterfront Compact views "longshoring operations" as encompassing the full range of maritime cargo-handling activities while under the direction, control, jurisdiction and responsibility of the carrier, its stevedore agent and the terminal agent-employer, *at all stages* throughout the waterfront terminal, until carted away by the consignee. It manifestly follows the very "nexus of employment", of which petitioners and NAS display a surprising lack of either knowledge or candor.

For example, the petitioner in *Blundo* claims that "Blundo is not a longshoreman", since "[i]n industry practice and parlance, a checker is not considered a longshoreman, nor is he normally part of the longshore gang hired to load or unload a vessel." (*Blundo* Brief at pp. 9, 19-20; See NAS Brief at p. 30). In advancing this "gang-oriented" approach, this petitioner, like the petitioner in *Caputo* and the NAS, would have the Court believe that Congress purported to do no more than to correct the immediate dilemma "at the water's edge" resulting from this Court's decision in *Nacerima Operating Co.* v. *Johnson,* 396 U.S. 212 (1969). At the same time, they ask the Court to look to other, indistinct criteria such as "point of rest" and to such indistinguishable factors as the scope of work of a longshore gang as compared with other movements of

(*footnote continued from preceding page*)

> have seen, the Committee indicated that employees who are directly involved in loading or unloading will be covered by the new Act. In the absence of explicit language which would establish a 'point of rest' dividing line for shoreside cargo handlers, we will apply this general test to them as well." (539 F.2d at 540; footnotes omitted.)

cargo discharged from vessels on or away from the terminal premises. (See, e.g., *Caputo* Brief at p. 21; *Blundo* Brief at p. 22).

It is a matter of public record that the classification of "checkers", descriptive of Blundo's title and functions, is an integral component in the definition of the certified unit encompassing longshore operations in the Port of New York. The unit was defined by the National Labor Relations Board in *Matter of New York Shipping Association, supra,* note 1. Successive collective bargaining agreements covering this overall certified unit and its component classifications have been negotiated between the NYSA (on behalf of its member carriers, stevedores and other employers of longshoremen and related crafts in the Port of New York) and ILA (on behalf of its members in affiliated locals). These agreements are consistent with the broad view of longshoring operations envisioned by the definitions and practices under the Waterfront Compact, *supra.*

Thus, all employees employed at waterfront terminals in the Port of New York who fall within the definition of the longshore unit and who therefore are covered by longshore Agreements are included in *the same* seniority system, are paid *the same* range of wages, are covered by *the same* longshore pension and welfare plans, and, significantly, are *all* beneficiaries of the unique, precedent-setting Guaranteed Annual Income system, which prevail in that port. In the event that checkers such as Blundo or general longshoremen (including terminal laborers) such as Caputo are injured in the course of their employment, they, like other members of the certified longshore unit, are entitled to use the facilities of the joint-industry medical clinics and to receive supplemental benefits available to other employees in related cratfts, as defined. Yet, petitioners contend that for compensation purposes ***alone*** they should be treated differently.

Certain inferences and conclusions necessarily follow from the foregoing.

Any claim that Blundo and Caputo are *not* longshoremen or are not engaged in longshore-related operations are specious and unrealistic. The asserted requirement that they be members of a longshore "gang" completely overlooks: (a) the fact, which is patent from the perspective of the longshore employee and which is admitted by petitioners (*Blundo* Brief at pp. 17-19; *Caputo* Brief at pp. 10-11), that inasmuch as modern container operations rarely require employees—including checkers and even members of the longshore gangs—to go aboard the vessels, the relation of their shore-based work to "the water's edge" dilemma in *Nacerima,* is non-existent. Consequently, their handling of containerized cargo is indistinguishable in all respects from handling of the same cargo by Caputo and Blundo in the terminal shed; (b) that "gang" members are part of *the same* bargaining unit and are covered by the same master collective bargaining agreement covering the checkers and other longshoremen in the shed, to which *the same* employers individually and/or collectively subscribe; (c) that the attempted comparison between the longshore-unit handling of containers, including stuffing and stripping work, with similar work performed by other units, at inland terminals or manufacturing facilities, subject to clearly dissimilar terms and conditions of work, is like the proverbial comparison between apples and oranges. (*Blundo* Brief at pp. 40-42; NAS Brief at pp. 30-31. See *ICTC, supra,* 426 F. 2d 884 at 889); (d) that the NAS's preoccupation with the extinct "public loader" (NAS Brief at p. 17, *et seq.*) is a resurrection of 25-year-old skeletons, which can have no bearing on the industry as it has developed following the Waterfront Compant and unit certification and in light of the well-established collectively-bargained customs and practices over the past two decades; and (e) that any fragmentation of the longshore unit by dint alone of a hiatus of time is entirely irrelevant, so long

as the employees are injured while they are employed by an "employer" within the definition of the Act as terminal employees in connection with the handling of cargo unloaded from a vessel. (See section 2, *supra.*)

4. Congress should not be presumed to have intended an injustice.

Petitioners would have this court rule that some of these longshoremen, if they are injured in the course of their employment, suddenly, and for only one purpose, cease to be longshoremen. *Quare:* Do the petitioners continue to be stevedores or terminal operators during the period that the claimants aren't longshoremen? Of course they do, and their longshore employees continue to be longshoremen, even if they get hurt. And should a longshoreman, in order to protect his coverage under the Act, require his employer to post signs as to which cargo is still in maritime trade and which is not? We submit that the situations posited by these questions are no less absurd than petitioners' distinctions.

This Court may discern, as does *Amicus,* an inherent incongruity in the disparate treatment of members of the identical longshore unit, who suffer indentical injuries caused by the sudden movements of the same piece of cargo, or in the course of performing miscellaneous functions relating to the same piece of cargo, whether or not inside or outside of the containers. This was poignantly pointed up in *Ford, supra,* at 539 F. 2d 533 (No. 75-2289, *Diverson Ford*), where the Fifth Circuit commented:

> "Petitioners' apparently concede that Ford would be covered if his work were part of a continuous operation which began with the cargo's departure from a ship's hold. As respondents correctly point out, we are being asked to deny coverage purely because of a discontinuity in time created by the cargo's having been stored for awhile along the shore. . . . The

> work which Ford was performing was evidently an integral part of the process of moving maritime cargo from a ship to land transportation." (See also, *id.* at 544 (No. 75-4112—*Will Bryant*)).

ILA respectfully submits, again from the longshoreman's perspective, that the fortuitousness of a job-related accident befalling an employee in a longshore or related craft who is working for a maritime employer in one capacity rather than another, should bear no relationship whatever to the employee's entitlement to recovery under the Act. In order to move maritime cargo, whether in break-bulk or in containerized packaging, the services of employees in a full "range of peripheral job opportunities" is *required* by the maritime employer. (See *ICTC*, 426 F. 2d 884 at 891). Consistent with this concept, which is borne out by the unit description and contractual coverage, are the characteristics of the operations of the Waterfront Commission employment system:

> Unit employees are either on lists of gangs assigned to particular piers or terminals or, when furloughed from such list or when not working as part of an established gang at a designated pier or terminal, longshore employees must make themselves available on a "prior-day-order" basis for work. They are then routinely assigned to jobs by the employers' dispatchers in accordance with availability of work within the Port. (See, e.g., *Statement of Facts, Caputo* Petition at p. 2.) The very interchangability built into the system, whether on the same pier or between sections of the port, demonstrates that there is an integrated relationship between the various job functions, whether termed as: "gang", "terminal labor" or other classification. This tends to defeat any attempt to segregate the various positions of employment by title or classification (See, e.g., *Blundo* Brief at pp. 31-32) from the tailgate of the truck to the deck or hold of the

> vessel *and vice versa*. (See also quote from NYSA's Brief, *supra*, at section 1.)

Petitioners further seem to contend that the very remoteness of time, distance or activity from the side of the vessel where the "gang" is employed, should cause denial of coverage and relief to persons such as Blundo and Caputo. Ironically, the Second Circuit in *ICTC* found exactly to the contrary. In discussing the effects of off-pier stuffing and stripping of containers on pier-side employment, the concurring judge perceptively remarked:

> "If a substantial amount of stripping and stuffing is diverted to separate container stations where activity is not continuous, the ILA could well anticipate that parts of the existing piers or docks would be closed down with a net loss of longshoremen's jobs." (426 F. 2d 884, 891; Anderson, C.J.)

The significance of this accurate observation, which is being realized at the present time in the Port of New York as the result of a decision of the National Labor Relations Board unrelated hereto, is that a decline—or siphoning off—of activity *performed in the terminal shed* has a telling impact on other work opportunities on the dock *all the way up to shipside* (i.e., affecting even the "gangs").

5. "Point of Rest" is anomalous. The Board's decisions are well-founded in law and on the facts.

From the vantage of the longshoreman in the Port of New York, there is no "mystery" behind Congress' coverage of "all of the large number of persons who participate in waterfront freight-handling up to and including the point of delivery to the consignee (in the case of import cargo) or receipt from the consignee (in the case of export cargo)." (*Blundo* brief at p. 17). Did not this Court in *Nacirema, supra*, while denying coverage there, concurrently recognize that if the legislatively-defined coverage under the (1927) Act was to have been extended shoreward,

then:

> "Congress might have extended coverage to *all* longshoremen by exercising its power over maritime contracts." (396 U.S. at 215; footnote omitted) (emphasis added).

Congress plainly intended by the 1972 Amendments to eliminate the differences in compensation coverages for injuries suffered in the longshore handling of cargo transported by vessels. As it did not stop at "the water's edge", it must be presumed to have gone further. As shown above, Congress unmistakably did not act in a vacuum of knowledge or information of advanced longshore operations. But neither did it extend coverage in the context of a "point of rest" an anomalous, peripatetic concept not encompassed by the pre-1972 Act.[8] If Congress truly meant otherwise, then surely it had the opportunity to clearly and unequivocally "draw the line" and/or to qualify the "presumption" in Section 920 of the Act.

It did neither and "there's the rub"! Instead of engaging in "line-drawing", a difficult, precise and complex task, it chose to take a functional, sensible and practical work and cargo-oriented approach. It took long-overdue cognizance of the indivisible interrelated and integrated panoply of "longshore operations". Rather than restrict coverage and merely change the pierside longshoremen's bounds, it removed the restraints and gave him the same sense and degree of protection accorded his brother on the vessel and the string-piece. As Judge Craven aptly and amply showed, the language of the Amendments is clear and applicable. *Adkins, supra,* 529 F. 2d at 1094-195. If the employers are dissatisfied and feel beleagured by the costs,

[8] That "point of rest" may be relevant to other aspects in the handling of cargo in the course of longshore employment *is not* determinative of compensability for injuries. Rather, the "nexus" of the employment relationship is determinative, as discussed above at sections 2 and 3.

then their pleas should be directed to the legislature—not Courts.[9]

The Board is, therefore, fully warranted in interpreting and administering the Act, as required of it by Congress. It did so within the parameters of the revised definitions of the Act, which the Act itself instructs the Board to liberally construe. Applicable precedents permit no other conclusion.

Though the premise of "point of rest" is appealing, it surely is not convincing. At the very least, it did not convince the members of the Benefits Review Board, who were selected to fill positions on the Board in consideration of their expertise in the industries covered by the Act. Accordingly, their consistent determinations in the instant and related cases, all of which arose subsequent to the 1972 amendments, should not be disturbed unless the records in these, as in the other cases, are wholly unsupportable on the facts or are unmistakably in contravention of the letter and discernible purpose of the Act.

Two Fundamental Irregularities

We request the Court's indulgence on two final points.

A. *Amicus'* position essentially coincides with that of the respondents, who seek affirmance of the decisions below. We nevertheless urge the Court to issue a determination consistent with that of the Board rather than that of the Court of Appeals. In this respect, we are in accord with

[9] Assuming, *arguendo,* that "point of rest" is a criterion, then the Board and the Courts will be required, under the theories propounded by the petitioners and NAS, to continue to strain under the facts of each and every case, differing from port to port and possibly from incident to incident, in deciding whether any particular claim or classification of claimant is or is not covered. Such a result is irrational, confusing, and unwarranted. It is the product of erroneous miscomprehensions of longshore operations and of the 1972 amendments.

petitioner in *Caputo,* who similarly detects an anomaly in the Court's suggested requirement that the Board must find that claimant "has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel" (Appendix to *Caputo Petition* at page 42; *Caputo* Brief at pages 10-11). We have no desire to repeat our arguments above, except to note that under the present state of longshore activity, it is increasingly the case that properly included employees do not venture aboard vessels. Even the petitioners seem to recognize this fact of life, and neither of them appears to seek to make it a condition for recovery.

B. *Amicus* takes exception to references in the briefs of petitioners and NAS to a purported survey produced by the NAS, entitled: "Stevedore and Marine Terminal Practices at the Ports of the United States". It is referred to and cited in various portions of the briefs and appendices.

We ask the Court to take notice that this document was never entered into evidence in the record herein or in the record of any other related or unrelated proceeding under the Act. It was neither subject to examination or cross-examination nor was it otherwise tested for accuracy or admissibility under the evidentiary rules applicable to Board and Court proceedings on review. It was *not* a part of the record before the Court of Appeals for the Fourth Circuit, nor was it a factor in the determination of the Benefits Review Board or any of its Administrative Law Judges. There is therefore no support whatever for an inference at footnote 34 at page 31 of NAS's brief that this document was part of the record in the Fourth Circuit or that it was ever considered by that Court. It remains nothing more than a self-serving, unverified memorandum, which does not rise even to the level of a law review article in view of its partisan authorship. We pray that the Court will not give it any significance in its consideration or deliberations in these cases, as it is no probative value.

CONCLUSION

The decision of the Court of Appeals for the Second Circuit in these cases should be affirmed, to the extent that it reflects the conclusions and determinations of the Benefits Review Board.

Respectfully submitted this
9th day of March, 1977.

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